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Introduction

The Changing Practices of International Law

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1.1 Introduction

In his seminal work, *The Changing Structure of International Law*, from 1964 Wolfgang Friedmann argued that international law has entered a new phase following the end of the Second World War.[1] In contrast to the formative period of modern international law, where the prime purpose of international law was to ensure co-existence and regulate conflict among sovereign states, contemporary international law has been supplanted by a drive towards deeper transnational cooperation. Next to the classical 'international law of co-existence' a growing 'international law of co-operation' would thus emerge, concerned with topics hitherto considered 'domestic affairs' such as economic development, welfare and good governance.

A cursory view at international law fifty years later largely seems to confirm Friedmann's premonition, and developments in many areas clearly exceed his expectations. The twentieth century has seen an almost exponential growth in multilateral treaties, the multiplication of specialized legal regimes and international institutions taking on a much more pervasive role in international relations.

What is sometimes referred to as the 'legalization of world politics' covers several distinct but related developments at the empirical level. The first is the *multiplication of actors*, or subjects, of international law. By this we mean, first, the increasing number of states participating in the international legal system. The emergence of a range of new states following the end of colonial rule and again following the end of the Cold War has meant

[1] Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964).

a horizontal or geographical expansion of international law from predominantly Western nations to a host of new states. Secondly, the proliferation of international organizations, transnational corporate entities and other non-state actors has increasingly challenged the notion of sovereign states as the exclusive subjects of international law. We may thus identify a similar vertical or functional expansion of international law as international organizations, corporations and individuals are increasingly recognized as parties to instruments and subjects of international law within such varied areas as international criminal law, trade law and human rights.

The second, parallel, development is the *expansion of treaty law*. Since the end of the Second World War, the world has seen a radical expanse of international legal agreements. The UN Treaty Collection currently counts more than 158 000 treaties and subsequent actions.[2] In some areas, political cooperation has extended a web of bilateral agreements; over the past quarter-century, the number of bilateral investment treaties has thus grown almost ten-fold to almost 3000.[3] Perhaps more significant, more than 6000 multilateral treaties have been signed since the beginning of the twentieth century.[4] Of these 30 per cent are general in nature and thus open for all states to sign.[5] Many of these treaties govern issues qualitatively different from the traditional international law of co-existence, challenging traditional conceptions of state sovereignty based on a separation of internal and external affairs. From trade law, to human rights, to environmental law, the growing international law of cooperation presupposes a fundamentally different commitment of participating states to correspondingly adjust domestic affairs as well as a shift of lawmaking powers towards international organizations and other non-state actors.

Thirdly, international law has been backed by much broader and stronger panoply of *international judicial institutions*, coupled to an

[2] Available online at http://treaties.un.org.

[3] http://investmentpolicyhub.unctad.org/IIA. As of 25 May 2017, there are 2960 bilateral investment treaties. In addition, there are 303 other treaties with investment provisions (e.g. free trade agreements). See www.unctad.org.

[4] A development that seems to have slowed down somewhat the last two decades.

[5] ILC Analytical Study 2006, ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi. UN Doc. A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006; Christopher J. Borgen, 'Resolving Treaty Conflicts' (2005) 37 *George Washington International Law Review* 57–80; Charlotte Ku, *Global Governance and the Changing Face of International Law*, ACUNS Keynote Paper (2001–2).

expansion and increasing overlap of their respective jurisdictions. With some 125 international judiciary institutions,[6] international law today is no longer the 'law without courts' as Hugo Grotius once described it.[7] Moreover, over the last decades the International Court of Justice has found violations in a number of controversial and security and human rights related cases.[8] The reach and case load of regional courts, such the European Court of Justice, and the regional human rights courts have similarly expanded; the European Court of Human Rights alone receives around 60 000 applications and issues some 1500 substantive judgments annually.[9] This growing adjudication is partly a result of the two trends above. The ratification of UNCLOS, WTO, NAFTA and the Energy Charter Treaty has each brought with them specialized adjudicatory and dispute resolution mechanisms, many of them encompassing powerful states that have traditionally avoided submitting to international jurisdiction.[10] The expansion in treaty law, such as bilateral investment treaties, has also led to a slew of interstate arbitrations before the Permanent Court of Arbitration (PCA). Yet, today the PCA also provides dispute resolution services in cases involving claims involving non-state actors such as transnational corporations. Similarly, new protocols have expanded the right to individual petition under a number of human rights treaties. Perhaps most noteworthy a host of new adjudicatory mechanisms has emerged since the 1990s. The two ad hoc International Criminal Tribunals for Rwanda and the former Yugoslavia were succeeded by the establishment of the International Criminal Court.

In addition to these trends of expansion, the different components of international law arguably display a higher degree of both political and judicial *interdependence* than Friedmann foresaw. In the context of the proliferation of specialized regimes, it is noteworthy that both legal instruments themselves and international legal institutions often make cross-references to other treaties and institutions. This is visible at the judicial level as well. Not only do different regional human rights courts cite each

[6] Calculation from the Project on International Courts and Tribunals, available at www.pict-pcti.org.

[7] Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to Interntional Law* (Cambridge: Cambridge University Press, 2012), 203–27.

[8] Malcolm Langford, 'The New Apologists: The International Court of Justice and Human Rights' (2015) 48(1) *Retfærd* 49–78.

[9] Kingsbury, 'International Courts', 208.

[10] J. H. H. Weiler et al., 'Special Issue: Changing Paradigms in International Law' (2009) 20 *European Journal of International Law* 21–109.

other, the appointment of prominent human rights lawyers to the International Court of Justice has arguably lend a stronger human rights profile to this institution as well.[11] Inter-operation equally works to break down the national-international divide.[12] Legislation allowing for universal jurisdiction in criminal cases and domestic incorporation of e.g. human rights instruments have allowed national institutions to play a much more decisive role in enforcing international law, and many national courts have become more confident to interpret and refer to international legal instruments.[13]

At the political level, different bodies of international law today interact to an extent where it becomes difficult to disentangle formally separate legal commitments. Recent suggestions have been made by some countries to renegotiate the 1951 Refugee Convention, yet the corner-stone of that instrument – the principle of non-refoulement – is enshrined in, or follows from, numerous other international and regional human rights treaties. Among EU Member States, any move to step down from the European Convention on Human Rights would further have political repercussions within the EU system, and informally the Strasbourg and Brussels Courts are clearly doing much to coordinate and avoid adjudicative conflicts. Interdependence is also evident at the level of treaty law, where cross-referencing multilateral obligations is becoming increasingly commonplace as part of bilateral agreements. Thus, foreign investment treaties may require the signing state to legally and politically commit to international standards in a wide range of other areas in order to secure a stable investment environment. States choosing to completely ignore property rights, labour laws and good governance principles thus ultimately risk financial isolation.[14]

Last, but not least, this changing landscape of international law clearly impacts its subjects. A number of scholars have pointed to the fact that the international law of cooperation and increasing powers granted to

[11] Rosalyn Higgins, 'Human Rights in the International Court of Justice' (2007) 20 *Leiden Journal of International Law* 745–751, at 746.

[12] André Nollkaemper, 'Inside or Out: Two Types of International Legal Pluralism', in Jan Klabbers and Touko Piiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2014), 94–142.

[13] Kingsbury, 'International Courts', 222; B. S. Chimni, 'Legitimating the International Rule of Law', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to Interntional Law* (Cambridge: Cambridge University Press, 2012), 290–308, at 296.

[14] H. R. Fabri, 'Regulating Trade, Investments and Money', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 352–372, at 359.

international legal institutions are undercutting national sovereignty and marginalizing the role of states as singular actors in the international legal field. In today's world, trans-governmental regulatory organizations,[15] transnational corporations[16] and NGOs[17] are becoming increasingly important actors in the development and governing of international law.

This normative thickening and expansion of law at all levels of international life has led some scholars to suggest that we live in an unprecedented era of 'legalization'.[18] This concept was originally forwarded as part of a particular theoretical framework, carrying with it a number of both analytical and normative assumptions with which we do not necessarily agree.[19] We use it here as a purely descriptive term. Legalization, in other words, is employed as a short-hand for the different developments in regard to international law described above. That across issue areas, resort to international law and institutions has become an 'ubiquitous presence' in political, academic and public discourse.[20] This empirical observation is shared by international lawyers across a wide range of theoretical positions. As David Kennedy observes:

> Although it is easy to think of international affairs as a rolling sea of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. There is law at every turn – and only the most marginal opportunities for engaged political contestation.[21]

[15] Anne-Marie Slaughter, 'Governing the Global Economy through Government Networks', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 177–205, at 204.

[16] Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law' (1983) 4 *Duke Law Journal* 748–88.

[17] Christine Chinkin, 'Human Rights and the Politics of Representation: Is There a Role for International Law', in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000), 131–48.

[18] Judith Goldstein et al., 'Introduction: Legalization and World Politics' (2000) 54 *International Organization* 385–99.

[19] For an engagement with and critique of this theoretical framework, see Chapter 7 in this volume; André Nollkaemper, 'The Process of Legalisation after 1989 and Its Contribution to the International Rule of Law', in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Oxford: Hart, 2012) 89–102; Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014).

[20] James Crawford and Martti Koskenniemi, 'Introduction', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 1–21, at 1.

[21] David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27 *Sydney Law Review* 5–28, at 5.

In short, international law has moved from being the *Buchrecht* of esoteric academics, to occupying a central position in diplomacy and public discourse. The question remains, however, what implications the legalization of world politics has for political life. For the original proponents of the legalization argument, the assumption was that the room for politics consequently narrowed and that conflicts would increasingly be resolved by or through legal means. As we shall see, however, not only has international law come to face substantial challenges, the very conception of international law and politics as a zero-sum game underlying such claims is fundamentally flawed.[22]

1.2 The Challenges to International Law

The 'legalization of world politics' is only part of the story. As part of its expansion and deepening, international law has also been confronted with certain structural and political challenges. First, the picture of legal codification has been questioned by those emphasizing the continued blind spots, gaps and inefficiencies. Critics have correctly pointed out that international law has yet to find satisfactory solutions to some of the world's most pressing problems. Globalization has brought with it a range of issues that do not easily fit the ordering categories of international law as traditionally defined. International law has thus struggled to respond to challenges brought on by e.g. climate change, global economic flows, corporate power and new forms of governance, each of which remain caught between the need for dynamic regulation and the traditional principles of sovereignty still underpinning international law. Moreover, breaches of international law continue to flourish in many areas. This is particularly evident in the area of international humanitarian law and human rights, where an obvious gap exists between rights and realities. Despite important developments, some human rights treaties are still associated with weak or selective monitoring and enforcement mechanisms, making the effect of ratifying human rights treaties no guarantee for actual implementation.[23] Despite the flurry of litigation, economists similarly disagree whether investment treaties actually deliver foreign investments. If we do live an era of legalization, this is still very much work in progress.

Secondly, the expansion of international law has also created concerns that international law may be losing internal coherence. The decentralized

[22] See further Chapter 2, this volume.

[23] Kingsbury, 'International Courts', pp. 203–27; Oona Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 71 *University of Chicago Law Review* 469–536.

structure of international law means that the proliferation of treaty law and international judicial institutions have not developed in the systematic fashion imagined by the international law's founding fathers. Rather, specialized regimes, functional differentiation and multiple fora for adjudication have emerged in a non-hierarchical setting, carrying with them an increased potential for conflicts between different bodies of law and centres of legal authority.[24] Conflicts may be sought resolved through tribunals, committees and commissions, but international law itself far from always provide clear solutions.[25] Concerns have been raised that growing fragmentation of international law will create normative incoherence.[26] While such concerns are hardly new,[27] international law has arguably become a much more messy place, harder for lawyers and judges to systematize and more demanding for states to navigate. For some this is both a natural and preferable outcome of an inherently pluralist international legal order.[28] For others this has led to calls for constitutionalism and the establishment of clearer hierarchies and enforcement mechanisms as known from national legal systems.[29]

Third, and perhaps most important, the political backlash to the increased influence of international law has become undeniable. States have voiced repeated concerns that international law is imposing unrealistic burdens and that international legal institutions are undermining democratic decision making and national sovereignty.[30] In Europe, several states have criticized its two regional courts, The Court of Justice of the European Union (CJEU) and the European Court of Human

[24] Karin J. Alter and Sophie Meunier, 'The Politics of International Regime Complexity' (2009) 7(1) *Perspectives on Politics* 13–24; Fischer-Lescano, Andreas and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1046; Margaret A. Young (ed.), *Regime Interaction in International Law. Facing Fragmentation* (Cambridge: Cambridge University Press, 2012); Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Panelists Are from Venus' (2015) 109 *American Journal of International Law* 761–805.

[25] J. Klabbers and T. Piiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013), 7.

[26] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553–79.

[27] W. Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401–453.

[28] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

[29] Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

[30] Ivan Anthony Shearer, 'In Fear of International Law' (2005) 12 *Indiana Journal of Global Legal Studies* 345–78.

Rights (ECtHR), for 'judicial activism' and overly dynamic interpretation, not least in regard to sensitive political issues such as welfare distribution, immigration and minority rights.[31] In 2016, the Danish Supreme Court, in clear defiance of the interpretation of the CJEU, reasserted the pre-eminence of Danish domestic law in a case concerning employment rights.[32] Resistance to the jurisdiction of the CJEU similarly played a prominent role in the UK campaign to leave the European Union, just as it has in the ensuring negotiations of the Brexit process.[33] In the US, the Trump administration announced withdrawals from both the Trans-Pacific Partnership Agreement (TPPA) on trade and the Paris Agreement on climate change, in addition to introducing a moratorium on new multilateral treaties.[34]

In sum, while we have seen an expansion and deepening of international codification and judicial institutions that place international law at the heart of international politics, any 'liberal progressive narrative'[35] must also take account of the mounting challenges to international law. International law far from always deliver on its promises. It does not necessarily resolve internal or external conflicts. Last, but not least, in a number of areas the international law has developed to a point where states feel threatened by their own creation. Never before has international law been so important, and never before subject to such intense political contestation.

[31] Mark Dawson, B. De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Cheltenham, UK: Edward Elgar, 2013); Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Rights' (2016) 79 *Law and Contemporary Problems* 141–78.

[32] Mikael Rask Madsen, Henrik Palmer Olsen and Urska Sadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' 23 *European Law Journal*, Issue 1–2, pp. 140–150.

[33] As noted by Theresa May in her speech at Lancaster House on 17 January 2017, 'We will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country'. Available at www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

[34] Jack L. Goldsmith, 'The Trump Onslaught on International Law and Institutions', Lawfare Blog, 17 March 2017. Available at www.lawfareblog.com/trump-onslaught-international-law-and-institutions; Monica Hakimi, 'International Law in the Age of Trump', EJIL:Talk!, 28 February 2017. Available at www.ejiltalk.org/international-law-in-the-age-of-trump.

[35] Tilmann Altwicker and Oliver Diggelmann, 'How Is Progress Constructed in International Legal Scholarship?' (2014) 25 *European Journal of International Law* 425–44.

1.3 Changing Politico-Legal Practices

The above characterization of simultaneous proliferation and growing challenges to international law are often presented as separate narratives or world views on the status of international law in contemporary society, and dealt with in isolation by legal and political scholars alike. In contrast, this volume aims to explore the interplay between these two dynamics and its implications for the development of international law. While other works have focused on what these developments mean for the role of international courts,[36] international organizations[37] or private actors,[38] such as transnational corporations or individuals, our focus is on how states as the original masters navigate the increasingly complex international legal order in which they find themselves embedded.

The starting premise for our analysis is that in this expanded web of bilateral and multilateral treaties, internationally empowered institutions and arbitrational bodies, the room for politics *outside* international law has arguably diminished. For the vast majority of states today, global governance means that international law has increasingly become a *sine qua non* for doing politics. At the same time, the shackles of international law have left many states eager to recoup sovereign power in areas of particular political importance. In extreme cases, this may lead states to resign from existing multilateral agreements. Yet, although the UK leaving the European Union, or the US abandoning the TPPA may well have deep-seated implications for the development of international law also beyond these specific regimes, it is far from clear that they spell a diminished role for international law as such. In their wake, different forms of international law are likely to emerge, spinning a web of bilateral and intergovernmental agreements. As several of the chapters point to, we may be seeing a qualitative transformation of international law towards different and more 'disaggregated' forms of international cooperation.[39]

At the same time, however, the multiplication of legal regimes, overlapping jurisdictions and shifting centres of authority seems to have opened up an increased playing field for political contestation *within* international

[36] See e.g. Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Cambridge: Cambridge University Press, 2014).

[37] See e.g. Jan Klabbers, 'Two Concepts of International Organization' (2005) 2 *International Organizations Law Review* 277–94.

[38] See e.g. Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).

[39] This terminology comes from Chapter 6, this volume.

law. As states are increasingly required to translate and justify their actions in legal terms,[40] governments have become much more adept at navigating and manoeuvring legal structures. When governments rely more heavily on their legal advisors,[41] it is not just to ensure compliance with international law or to successfully stake their claims as part of legal challenges, but also to resort to what might be called 'creative legal thinking'.[42]

As H. L. A. Hart famously noted, international obligations are by definition 'open-textured', and interpretation thus often depends on general principles, transnational adjudication and state practice.[43] Normative developments in the form of further codification, adjudication and soft law are often assumed to remedy this problem by further clarifying interpretation. As international law has developed, however, it could well be argued that this may also work in reverse. The multiplication of legal regimes, overlapping jurisdictions and diffusion of authority also provides for more conflicts within and between international law. This in turn opens up an increased room for political manoeuvring in relation to international law, where governments are able to apply a pick-and-choose approach across different legal regimes, standards and adjudicatory venues. International law in this sense is not only regulating and constraining but also enabling, legitimizing and constituting certain politics, often unforeseen and far removed from the original intentions behind the particular legal regimes and instruments in question. From migration control, to surveillance and trading of emission and fishing quotas, states are increasingly designing policies and actions to work at the fringes or in between the mazes of international law, exploiting interpretative uncertainties, reverting on soft law standards, or establishing novel categories and concepts on the basis of domestic or other parts of international law.

The range of these practices is broad, not only in terms of the different issue areas where they can be observed, but also in terms of the kind of strategies that may be identified. At the more general level at least six

[40] Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford: Oxford University Press, 2011).

[41] Kennedy, 'Challenging Expert Rule', 5; see also Anna Leander and Tanja Aalberts, 'Introduction: The Co-Constitution of Legal Expertise and International Security (Symposium)' (2013) 26 *Leiden Journal of International Law* 783–92.

[42] Thomas Gammeltoft-Hansen, 'The Role of International Refugee Law in Refugee Policy' (2014) 27 *Journal of Refugee Studies* 574–95.

[43] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 121–44; Brian Bix, 'H.L.A. Hart and the "Open Texture" of Language' (1991) 10 *Law and Philosophy* 51–72.

different types of strategies may be identified, which are used across different issues areas.

A first set of practices relates to the strategic use of extra-territorial venues – often termed *jurisdiction shopping* – in the attempt to shift or avoid legal liability under either domestic or international law. For example, since the 1990s states have interdicted migrants on the high seas, arguing that this nullified any right to claim asylum as a matter of international refugee or human rights law, as the asylum seekers would never reach their territories.[44] It can also involve deals to make use of another state's territory. Transnational law enforcement and detention has similarly been used to disclaim sovereign obligations in relation to domestic due process guarantees or international human rights.[45] This may involve the concomitant commercialization of sovereignty by the territorial state, as in the case of Guantanamo Bay, where a bilateral agreement is drawn up 'renting' parts of Cuban territory to the US.[46] Or it may involve more complex arrangements between multiple states, as in the case of the CIA rendition programme. Jurisdiction shopping may also be pursued in relation to commercial interests. States may thus be seen to negotiate agreements to allow industrial manufacturing in third countries with fewer or lower environmental and labour rights restrictions. The effort to establish national fishing quotas as a matter of international law has thus equally seen a number of southern European states negotiate agreements with its African neighbours to allow European trawlers to fish within their territorial waters and exclusive economic zones.[47]

Closely related to jurisdiction shopping, states may also be seen to engage in *international cooperation* for the purpose of circumventing or shifting particular legal obligations. As in the above case, the argument is that the active, or even nominal, involvement of another state's authorities can be used to either avoid legal liability on behalf of the sponsoring state, or to circumvent constraints otherwise posed by international law. Examples of such outsourcing between states are rife across various issues

[44] A practice subsequently accepted to entail jurisdiction as a matter of international human rights. Thomas Gammeltoft-Hansen, 'Sale's Legacy – "Creative Legal Thinking" and Dynamic Interpretation of Refugee Law', Opinio Juris, 15 March 2014. Available from www.opiniojuris.org. See further Chapter 8, this volume.

[45] See more generally, Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalization: Transnational law enforcement and migration control* (Abingdon: Routledge, 2016).

[46] See Chapter 3, this volume.

[47] Francisco Orrego Vicuna, *The Changing International Law of High Seas Fisheries* (Cambridge: Cambridge University Press, 1999).

of law enforcement. Some states have thus been known to send terrorist suspects to partner states in order to effect interrogations with techniques that would not be allowed in the sponsoring state under either domestic or international law. In both the Pacific and the Americas deals have similarly been struck to involve third state authorities in efforts to combat international crime, and in particular drug smuggling, thereby circumventing the obvious constraints otherwise posed by international law when intercepting suspected smuggling vessels on the high seas or carrying out raids inside the territory of another state. It may equally involve joint or concerted actions.[48] The use of ship-riders – authorities of a territorial or neighbouring state – has thus become increasingly popular in the area of both migration control and efforts to stop drug smuggling.[49] Similarly, countries such as Denmark have routinely involved British soldiers when undertaking military patrols in Iraq in the attempt to avoid triggering any direct human rights obligations when taking persons into custody.[50]

The expansion of international law has also encountered a transformation of international politics through the process of new governance patterns, including the *outsourcing of governmental functions to private actors*. Hence another set of political-legal strategies makes use of (and contributes to) the shifting boundaries between public and private authorities. The practice of states to contract private military companies has been an increasingly common practice, raising a number of different issues in terms of state responsibility and accountability under both domestic and international law.[51] Private security companies have similarly been employed by maritime companies and in the context of anti-piracy operations.[52] Privatization has similarly become popular in the area of

[48] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*(Cambridge: Cambridge University Press, 2009).

[49] Ibid., p. 72ff.

[50] Anders Henriksen, 'Fanger, folkeret og "brite-finter"' [Detainees, international law and 'the British Trick'] (2014) 87 *Økonomi & Politik* 6–15.

[51] Anna Leander, 'The Paradoxical Impunity of Private Military Companies: Authority and the Limits to Legal Accountability' (2010) 41 *Security Dialogue* 467–90; A. Claire Cutler, 'The Legitimacy of Private Transnational Governance: Experts and the Transnational Market for Force' (2010) 8 *Socio-Economic Review* 157–85; Carsten Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 *European Journal of International Law* 989–1014.

[52] John J. Pitney Jr and John-Clark Levin, *Private Anti-Piracy Navies: Warships for Hire Are Changing Maritime Security* (Plymouth, UK: Lexington Books, 2013); Jill Harrelson, 'Blackbeard Meets Blackwater: An Analysis of International Conventions That Address

migration, where private actors have taken on a broad range of migration management functions, from visa issuance and migration control, to the operation of detention facilities and carrying out deportations.[53] The widespread use of carrier sanctions legislation – fining airlines and other transportation companies for bringing in unauthorized passengers – is perhaps the clearest example of how private actors are routinely taking on migration control functions through a legal construction that effectively distances the state from any associated human rights responsibility. Often these arrangements involve several layers of subcontracting, or take place as part of extra-territorial operations, thereby further complicating questions of accountability and the possibility to 'pass the buck' for any subsequent wrongdoing.[54]

A third strategy involves what might be called *regime or treaty shopping*. Whereas the strategies above both seek to exploit jurisdictional differences in terms of regulation, regime shopping is premised on a functional logic and the co-existence of multiple, partly overlapping and non-hierarchical treaty regimes. International regime complexity[55] means that issues can be dealt with via multiple regimes, nested in different institutional arrangements, and with different responsibilities towards different parties. For instance, the issue of intellectual property rights is regulated via the WTO's trade regime through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), but is also addressed by the World Health Organisation (for instance in case of patented pharmaceuticals in the fight against HIV/Aids in developing countries), and the Convention on Biological Diversity. The latter enables the subordination of intellectual property rights to environmental protection and development goals, which goes against the TRIPS arrangements.[56] The

Piracy and the Use of Private Security Companies to Protect the Shipping Industry' (2010) 25 *American University International Law Review* 283.

[53] Thomas Gammeltoft-Hansen, 'Private Security and the Migration Control Industry', in Rita Abrahamsen and Anna Leander (eds), *Routledge Handbook on Private Security* (New York: Routledge, 2015), 207–217.

[54] Carsten Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 *European Journal of International Law* 989–1014.

[55] Alter and Meunier, 'The Politics of International Regime Complexity'; cf. Kal Raustiala and David Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 85 *International Organization* 277–309.

[56] Raustiala and Victor, 'The Regime Complex'; Laurence R. Helfer, 'Regime Shifting; the Trips Agreement and the New Dynamics of International Intellectual Property Making' (2004) 29 *Yale Journal of Intenational Law* 1–81. Raustiala and Victor push the argument even further and identify this as a practice of 'strategic inconsistency', which is the creation

dynamics of regime complexity are further enhanced by the expansion of 'soft law' instruments, such as declarations, guidelines, standard-setting and recommendations.[57]

Following on from this, states may fourthly seek to resolve legal conflicts at the judicial venues where they expect the most favourable view on the legal case, or where the underlying legal regime at both primary and secondary level may work most to their benefit – what might be called *judicial forum shopping*. Again, the room for such practices has increased as a result of the proliferation of international arbitration bodies with partly overlapping mandates. For instance, North American trade disputes can be brought to either the WTO or to NAFTA, which will then have a different effect of precedence, and be binding upon different partners. Judicial forum shopping, hence, is not only about winning a particular case, but can also be about discriminating among overlapping memberships[58] in light of a legal 'shadow of the future logic'. Judicial forum shopping is not only a matter of strategic choice at the moment of decision where to file your case, but can also involve the simultaneous or successive litigation of claims.[59]

A fifth aspect of political manoeuvring relates to *interpretive framing* more generally. As noted above, international law, in particular, tends to be 'open-textured', and interpretation thus often depends on general principles, soft law, transnational adjudication and state practice. As such, interpretation and framing is inherent in the operation of law. In the expansive developments of international law, the potential for conflicts further multiply, and international law itself far from always provides clear-cut or singular solutions to solve them. Yet, interpretative framing is not only a matter of stating your case before the court or in international diplomacy. Madeleine Albright's famous suggestion to Robin Cook 'to get new lawyers' in order to justify the unilateral intervention in Kosovo illustrates the partisan function of advocacy and apology that legal advisors often

of contradictory rules in parallel regimes in order to undermine existing rules in other agreements.

[57] Cf. mapping of the regime complex for climate change in Robert O. Keohane and David G. Victor, 'The Regime Complex for Climate Change' (2011) 9 *Perspectives on Politics* 7–23.

[58] Mark L. Busch, 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade' (2007) 61 *International Organization* 735–61.

[59] Laurence R. Helfer, 'Forum Shopping for Human Rights' (1999) 148 *University of Pennsylvania Law Review* 285–400. He does not see this as a threat to the unity of the legal system but rather emphasizes the aforementioned practice of interdecision making which makes international human rights litigation a 'shared and ongoing enterprise' producing 'harmonious, though not necessarily uniform, set of human rights standards' (ibid., at 400).

occupy.[60] Indeed, it is a hallmark of a good lawyer that s/he can provide a valid legal argumentation for either position in a dispute, which is sometimes what governmental legal advisors are expected to do.[61] At its most extreme, this practice of lawyering as part of high politics is sometimes referred to as 'lawfare'.[62] It illustrates that the formalist and categorical distinction between lawmaking and its subsequent application ignores the interpretive aspect of any linguistic activity, and naively assumes that law can speak for itself. At the same time, it is precisely international law's appearance of objectivity that makes it such a powerful tool for the pursuit and legitimation of political objectives.[63]

Last, but not least, deference to other forms of non-legal expertise may be considered a distinct political-legal strategy in this connection. Although not directly a practice of creatively manoeuvring international law itself, the role of technical and scientific expertise has become an ingrained aspect of much legal discourse today.[64] In order to settle disputes in international environmental law or various jurisdictional and exploitation claims under the Law of the Sea, specialized technical knowledge concerning respectively emissions or the determination of e.g. equidistance principles and underwater geology is required. Rather than only lawyers, it is more and more scientists that are called into the courtroom to provide scientific evidence to support a given case. This technicalization has in some instances led to the privatization of legal rulemaking and dispute settlement, for instance in the case of internet domains to the International Corporation for Assigned Names and Numbers.[65] This 'politics of (legal) expertise'[66] is thus another interesting example

[60] James Rubin, 'Countdown to a Very Personal War', Financial Times, 30 September 2000.

[61] Shirley V. Scott, *International Law in World Politics: An Introduction* (Boulder, CO: Lynne Rienner, 2010), 138n9. See also the special issue on the role of legal advisers in foreign policy making in (1991) 2 *European Journal of International Law*.

[62] David Kennedy, *Of War and Law* (Oxford: Oxford University Press, 2006); Wouter G. Werner, 'The Curious Career of Lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 61–72; Pascal Vennesson and Nikolas M. Rajkovic, 'The Transnational Politics of Warfare Accountability: Human Rights Watch versus the Israel Defense Forces' (2012) 26 *International Relations* 409–29.

[63] Scott, *International Law in World Politics*, Chapter 7.

[64] Chapter 7, this volume.

[65] Gillian K. Hadfield, 'Privatizing Commercial Law: Lessons from ICANN' (2002) 6 *Journal of Small and Emerging Business Law*, 257–288; A. Claire Cutler, 'The Legitimacy of Private Transnational Governance: Experts and the Transnational Market for Force' (2010) 8 *Socio-Economic Review* 157–85.

[66] Leander and Aalberts, 'The Co-Constitution of Legal Expertise and International Security'; Wouter G. Werner, 'The Politics of Expertise: Applying Paradoxes of Scientific Expertise to International Law', in Monika Ambrus et al. (eds), *The Role of Experts in International*

of manoeuvring in which legal objectivity is boosted with supposed-scientific objectivity.

These forms of *extralegal deferral* are of interest here because they implicitly define the boundaries between what fall under the remits of international law.[67] Whereas this entails a formal authority question (cf. the US Act of State doctrine),[68] it is also linked to questions of different kinds of expertise. For instance, in the *Targeted Killings* case, the US District Court of Columbia dismissed the case on the basis of the constitutional division of power and because the issue required 'expertise beyond the capacity of the Judiciary'.[69] Whereas in the case of such high security issues this is in turn often linked to the availability of classified evidence,[70] international legal questions today are increasingly subject to a variety of extra-legal expertise, each with their own standards of what is 'proportionate', 'optimal' or 'reasonable' for the issue at hand.[71]

These political-legal strategies form the starting point for exploring the paradox of increasing legalization increasing the room for politicization within/of international law through empirical case studies. This typology should not be considered an exhaustive nor a conclusive list. Focusing on different legal regimes and issue areas, the various chapters to the volume each analyze examples of politico-legal manoeuvring enabled by these regimes. As the case studies show, different strategies are often employed in combination in relation to a given policy issue.

Decision-Making: Advisors, Decision-Makers or Irrelevant? (Cambridge: Cambridge University Press, 2014).

67 Leander and Aalberts, 'The Co-Constitution of Legal Expertise and International Security'; Werner, 'The Politics of Expertise'.

68 The US Act of State doctrine seeks to exclude matters of foreign policy from judicial overview by domestic courts. As an avoidance doctrine, under the Act of State judges can decide to refrain from adjudication to determine the (il)legality of a state's action, and thus de facto defer to politics. It runs parallel to the 'political question' doctrine, also known as the non-justiciability principle from the *Buttes Gas and Oil* case.

69 Cf. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010), 77. Available at www.ccrjustice.org/files/2010.12.07_Al-Aulaqi%20Decision_0.pdf.

70 Erna Rijsdijk, 'The Politics of Hard Knowledge: Uncertainty, Intelligence Failures, and the "Last Minute Genocide" of Srebrenica' (2011) 37 *Review of International Studies* 2221–35; Gavin Sullivan and Marieke De Goede, 'Between Law and the Exception: The Un 1267 Ombudsperson as a Hybrid Model of Expertise' (2013) 26 *Leiden Journal of International Law* 833–54.

71 Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1–30. Cf example of software engineers who develop algorythms for drones, Louise Amoore, *The Politics of Possibility* (Durham, NC: Duke University Press, 2013).

1.4 Implications for International Law

It is important to note that the kind of practices examined in the present volume are hardly representative of states' commitment to all aspects of international law. Henkin's famous observation that '[a]lmost all nations observe almost all principles of international law and almost all their obligations almost all of the time' arguably still holds true today, despite recent challenges to core parts of the international legal corpus.[72] The practices explored in the following chapters rather represent a particular kind of political response in areas where states feel unduly constrained by international law in light of important political priorities, and where the two obvious alternatives – openly disregarding legal obligations or seeking to renegotiate or step down from international legal instruments – are considered unfeasible or too costly. What these practices represent is a different way for states to broker the *pouvoirs constitué-pouvoirs constituant* dilemma of international law.

Two further points follow from this. The emergence of these practices is not tantamount to a rejection of international law as such – far from it. In most cases, policies to e.g. offshore or outsource certain law enforcement functions in order to avoid incurring correlate legal obligations inter alia presume that such norms do actually matter and, under ordinary circumstances, affect state action. If governments felt they could simply disrespect international law 'at home', then there would be little need to engage in cumbersome and often costly schemes to engage in extra-territorial law enforcement or cooperation with third state authorities. These governance strategies are exactly what makes it possible for states to apply a more managerial approach to international law, but nonetheless still formally present themselves as countries abiding by their international law commitments.

In much of the existing literature, the different policies listed above are treated as exceptions or aberrations to the ordinary *modus operandi* of international law; something taking place 'beyond the rule of law', in a 'rights vacuum' or creating a 'legal black hole', where international politics trumps international law.[73] Such dismissals, however fail to acknowledge how these practices are in fact enabled by international law

[72] Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 1979), 47.

[73] See e.g. Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1–15; Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26 *Michigan Journal of International Law* 739–806.

itself.[74] Moreover, most, if not all, of these practices are coached and framed through bilateral or multilateral international legal agreements. The international law of cooperation, in other words, is the very vessel through which they are implemented.

More fundamentally, it is important to recognize that these practices are not merely temporal aberration or exceptions to an idealized idea of the standard *modus operandi* of international law, but rather a pervasive and systematic trait of the international legal system today.[75] That is not say that they are necessarily a new phenomenon. The modern-day contracts with private security and military companies have their historical precursors in the use of mercenaries and privateers. In the US, carrier sanctions was first introduced in the 1902 Passenger Act, requiring shipmasters to sign an affidavit to verify that all passengers were in good physical and mental health,[76] and as early as 1751 Denmark levied fines from shipmasters bringing in Jewish passengers.[77] More generally, strategies of interpretative framing and forum shopping have always been part of international law, just as several historical cases before the International Court of Justice have hinged on the production of relevant scientific data.[78]

It is, however, during the most recent decades that such practices have become more prevalent and more visible, facilitated by the aforementioned development in international law. Developments in international law provide both cause and solution. As international legal commitments expand and deepen, states are actively looking for ways to recoup sovereign manoeuvrability in other ways. At the same time, this very expansion simultaneously create more opportunities for states to strategically engage with and seek to navigate international law. International law has similarly paved the way for changing patterns of governance. Many of these practices rely on transnational arrangements, allowing states to

[74] See e.g. Chapter 3, this volume. See further Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16 *European Journal of International Law* 613–35; Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013).

[75] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Abingdon: Routledge, 2007).

[76] Aristide Zolberg, 'Matters of State', in Charles Hirschman, Philip Kasinitz and Josh DeWind (eds), *The Handbook on International Immigration* (New York: Russell Sage Foundation, 1999), 71–93, at 75.

[77] Martin Schwartz Lausten, *Jøder og kristne i Danmark: Fra middelalderen til nyere tid* (Copenhagen: Anis, 2012).

[78] See e.g. *North Sea Continental Shelf, Germany v. Denmark*, International Court of Justice, ICJ Rep 3, ICGJ 150, 20 February 1969.

exercise sovereign functions in concert, extra-territorially, through private parties or as part of international organizations.

Moreover, it should be underscored that states may well feel politically justified in this approach. While some of the above examples may seem to suggest a 'bad state' theory akin to Oliver Wendell Holmes's famous jurisprudential doctrine,[79] in some instances states may have a legitimate interest in regaining political control against international law. For many developing countries, creative legal thinking might be a necessary precondition to re-establish public control vis-à-vis international investors, regardless of how one views such practices.[80] Indeed, this and other volumes have shown that developing countries are significantly more likely to lose or have less influence in adjudication even after one controls for various factors.[81] At a more general level, some might argue that the practices described in this volume ultimately serve a constructive purpose, functioning as a political pressure valve and avoiding more direct confrontations leading to disrespect for or regressive revisions of important areas of international law.

It should also be remembered that state strategies to avoid or eclipse legal responsibility are of course far from always successful. While Madeline Albright's new lawyers may be argued to have tipped the balance in the Kosovo war to 'illegal but legitimate' in the eyes of the international community, creative legal thinking did not do the trick for the US, the UK and their allies in the 2003 Iraq war. While they argued a revival of the 1990s resolutions as the legal basis for an intervention, the overall opinion of the international community and legal scholars was that Resolution 1441 indicated that a second resolution was necessary to authorize the use of force. However, our focus here is not necessarily on the success of a particular legal argument, but on which arguments can be made in the first

[79] Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457–61; see further Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen, eds, *Human Rights and the Dark Side of Globalisation; Transnational Law Enforcement and Migration Control* (London: Routledge, 2016).

[80] See Chapter 4, this volume.

[81] See Daniel Behn, Tarald Berge and Malcolm Langford, 'Poor States or Poor Governance? Testing Claims of Systemic Bias in Investment Treaty Arbitration' (forthcoming) *Northwestern Journal of International Law & Business*; Cosette Creamer, 'Between the Letter of the Law and the Demands of Politics: The Judicial Balancing of Trade Authority within the WTO' *Working Paper* (2015). Note though that Cesare Romano claims that the situation has as least improved for developing countries compared to the post-war years: Cesare Romano, 'International Justice and Developing Countries' (2002) 1 *The Law and Practice of International Courts and Tribunals* 539–611.

place. Thus we are interested in the boundaries for validity, more than success, truth or legality as such.[82]

Moreover, it should not be forgotten that the expansion of international law has also enhanced the ability of courts and other legal institutions to reign in such practices. Although the establishment of state responsibility in such cases are, by design, a far from straightforward matter, those who proclaim that these practices take place in a legal black hole tend to overlook the substantial developments in the interpretation of, for example, international human rights, international humanitarian law and international environmental law. In many areas, normative developments and jurisprudence have managed to respond to new policy developments. Several policies regarding jurisdiction shopping have thus been successfully challenged by domestic or international courts, forcing governments to abandon or substantially adjust their practice. At the same time, however, this jurisprudence is often politically contested, and itself subject to a host of different politico-legal strategies.[83] What emerges is a dialectic between normative and policy developments, each driving the other.

By focusing on the above practices of international law, the present volume seeks to develop two arguments simultaneously: one about international law as increasingly regulating and constraining international relations by defining or reconfiguring the parameters of international political action; the other, about international law as enabling certain policies that exploit the particularities of international law to recoup and legitimize political power. In other words, governments appear to have become both more norm-savvy and more strategic in their relationship to international law. This is a distinctive form of politics, both constrained *and* facilitated by a plethora of international rules and legal institutions.[84] It

[82] This shifts the inquiry away from the pitfalls of policy-oriented jurisprudence and instrumental understandings of international law in its wake, on one side, and of a formalism that blends out the creativity and the politics of the legal practice, on the other. Tanja E. Aalberts and Ingo Venzke, 'Moving Beyond Interdisciplinary Turfwars: Toward an Understanding of International Law as Practice', in André Nollkaemper et al. (eds), *International Law as Profession* (Cambridge: Cambridge University Press, 2017), 287–310, at 305. On legality as a form of practice, see Nikolas M. Rajkovic, Tanja E. Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge: Cambridge University Press, 2016).

[83] See e.g. Chapter 5, this volume.

[84] Kenneth W. Abbott and Duncan Snidal, 'Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars', in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013), 33–56, at 35.

is this dual dynamic between politics and international law that accounts for both the success of and challenges to international law in our current age. These practices are thus not a sign of eroding respect for international law and cooperation. On the contrary, they should be seen as a systemic feature of the international legal landscape today, and a logical countermove to the growing power of international law and its political and judicial institutions.[85]

This in turn means that international law itself cannot provide the solution to its shortcomings and challenges through more rules and better institutions, nor can social science models that only seek to determine international law's effectiveness through analysis and prediction of state behaviour. Rather, the very paradox of international law is like grannie's crochet blanket: the more layers you add, the more holes or gaps emerge.

The last decades have seen a tremendous growth in scholarly literature seeking to theorize the politics of international law from different perspectives. While this body of literature carries many important insights as reflected above and in the following chapters, the starting point for the present volume is deliberately inductive. Each chapter is based on an empirical mapping and overview of contrasting developments in international law, from which we build our analytical framework. Such an approach may be seen to share certain affinities with other recent scholarship, including the call for 'empirical' and 'anti-formalist' approaches to international law forwarded by e.g. new legal realism,[86] as well as the turn to 'practice theory'[87] as a counter-strategy to the a priori theorizing that has characterized much of the literature at the intersection between international law and International Relations. The contributors to this volume, however, represent scholars from a broad church of international legal theory. For the present project, we have thus adopted a more pluralistic approach with the hope of opening up space for more fruitful academic exchange in light of recent developments in international law.

1.5 Structure of the Volume

The ensuing chapters to this volume are all empirically grounded; each chapter seeking to analyze the various ways in which states have made

[85] See further Chapter 2, this volume.

[86] See e.g. Jakob Holtermann and Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible' (2015) 28 *Leiden Journal of International Law* 211–30, as well as other articles in this special issue on new legal realism.

[87] Rajkovic, Aalberts and Gammeltoft-Hansen, *The Power of Legality*.

creative use of developments of international law and globalization. To demonstrate the breath and pervasiveness of these practices, we have included chapters that span a range of different topics, from migration and surveillance to foreign investment arbitration and environmental policy, and a number of different legal regimes, from EU and international human rights law to the law of the sea.

As the conceptual backdrop to the empirical observations in this chapter and the case studies, Chapter 2, by Tanja Aalberts and Thomas Gammeltoft-Hansen, locates the approach of the present volume amidst different conceptions of the relationship between politics and international law within International Law and International Relations. In line with the empirical and problem-driven approach presented here, the ambition is not to dictate one particular theoretical framework upon the case studies, but rather to open up dialogue across theoretical orientations and academic disciplines about the role of international law in contemporary world politics. To this end, the chapter employs the notion of sovereignty games as a heuristic to unpack the relationship between sovereignty, international law and politics.

The following chapter, by Margareta Brummer, aims to expose the structure of the formation process of the extra-territorial location. It retraces how three particular geographical zones – the Guantanamo Bay detention centre, the military base of the US in Diego Garcia and the CIA-led prison in Poland – are rendered extra-territorial by a tripartite process of *abandonment*, *construction* and *denial* in form of creative legal argumentation. Her chapter argues that the formation of a zone can always be articulated with the territorial-legal vocabulary that serves the actors in the fulfilment of their aims and preferences, while discarding those arguments that do not fit their aims. International law should thus be seen as complicit in creating regular instances of territorialization.

The development of the modern investment treaty regime represents a remarkable extension of international law in the post-war period. However, the development of this regime has precipitated a backlash from various states, civil society actors and scholars over the past decade, particularly on account of the explosion of litigation by foreign investors against host states. Many of these investment treaty arbitrations have resulted in sizeable compensation awards for actions that many states believe are both legitimate and within their exclusive purview as sovereigns. This tension between the rights afforded to private foreign investors under international treaties and the legitimate rights of sovereign states to regulate in the public interest of their domestic citizenry has culminated in efforts

by states to weaken the regime. In Chapter 4, Malcolm Langford, Daniel Behn and Ole Kristian Fauchald analyze the strategies and tactics, particularly those of a more questionable nature, that states are employing to scale back the unintended consequences of the international investment regime while simultaneously claiming adherence to its international legal obligations.

Chapter 5, by Moritz Baumgärtel, examines state strategies in relation to the European Court of Human Rights and the Court of Justice of the EU in regard to cases concerning migrants and asylum seekers. This represent one of, if not the, most difficult and pressing issues before the two courts. The current refugee crisis and the ascendance of a right-wing political climate have created a volatile situation in which European governments increasingly enact legally questionable policies, which in turn are being challenged before the two European courts. Looking at recent cases, this chapter explores how governments maximize their 'sovereign manoeuvrability' when confronted with European-level litigation. It describes four different strategies of 'managing' and containing the impact of such rulings: legal argumentation about the scope of the relevant instruments, policy implications and procedural requirements; 'anticipatory measures' aiming to strike out cases or to contain public reactions to adverse rulings; 'peer mobilization' exerting collective pressure on the courts; and post-judgment positioning vis-à-vis the judgment or the court in question. The chapter thereby highlights how changing practices of international law require more differentiated evaluations even of the influence of strong and assertive international judicial bodies such as the two European courts.

In the following chapter, Itamar Mann takes on the equally thorny issue of surveillance and examines bilateral and multilateral arrangements for the collection of signals intelligence between the US's National Security Agency and its partner organizations in other countries. He argues that these arrangements, which at face value appear far removed from the domain of public international law, in fact embody a particular genre of transnational lawmaking. They involve the work of lawyers, and include various soft law instruments that have partaken in a radical disaggregation of the national security state. While the chapter's main objectives are descriptive and analytic, Mann also signals a normative insight: rather than focusing exclusively on individual rights to privacy, lawyers seeking to intervene in the emerging transnational law of mass surveillance ought to focus more on the structural aspects of the agreements that facilitate it.

Jaye Ellis focuses on international environmental protection in Chapter 7. While this is often considered be a highly legalized field, a closer look reveals a good deal of ambiguity regarding law's role. Legal instruments and regimes to address various aspects of environmental protection have proliferated, but at the same time states have managed to maintain a reasonably high degree of control over their legal obligations pertaining to environmental protection. Strategies to manage legal obligations include deference to experts, opportunities for forum shopping by virtue of a multiplication of self-contained regimes, and inefficiency. This is in sharp contrast to the functioning of trade disciplines that states have imposed on their environmental and health standards. As environmental regimes become more complex and highly specialized, the role of law loses ground to other forms of expertise, notably scientific and economic. Legalization turns out to be a thinly disguised managerialism.

Chapter 8, by Thomas Gammeltoft-Hansen and Tanja Aalberts, analyzes the interplay between politics and law in the recent attempts to strengthen the humanitarian commitment to saving lives of migrants in the Mediterranean. Despite a long-standing obligation to aid people in distress at sea, the search and rescue regime has been marred by conflicts and political stand-offs as states were faced with a growing number of capsizing boat migrants potentially claiming international protection once on dry land. Attempts to provide a legal solution to these problems have resulted in a re-spatialization of the high seas, extending the states' obligations in the international public domain based on geography rather than traditional functionalist principles that operated in the open seas. However, inadvertently, this attempt towards further regulation has simultaneously enabled states to instrumentalize international law to barter off and deconstruct responsibility by reference to traditional norms of sovereignty and the law of the sea. In other words, states may be seen to skilfully navigate the different waters of international law themselves in order to recoup sovereign power.

The final chapter recapitulates the main findings of the substantive chapters and their relationship to the overall argument of the volume. One argument going through all chapters is that in order to understand the seemingly contradictory developments of international law today, we need to take a step back and pay more attention to how strategic navigation of rules is facilitated by international law itself. The second section of the chapter sets out to outline a possible research agenda on this basis. At the most immediate level, this relates to nuancing and expanding the

attempted typology set out in this chapter, as well as expanding the empirical gaze to include other pertinent issues, such as international tax regulation, the law of armed conflict and the current claims for resources and navigation rights in the Arctic. More generally, such an agenda emphasizes more empirical approaches to the study of international law as a strategy to accommodate different theoretical orientations and explanatory frameworks.